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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-189063

DATE: November 11, 1977

MATTER OF: Paul N. Howard Company

DIGEST:

IFB which solicits bids on four alternate methods of performance without indicating method of selecting among alternates should not be resolicited where bid selected by grantee for award is low under any one of the four.

The Paul N. Howard Company (Howard) has requested that we review the cancellation of a solicitation by the Puerto Rico Aqueduct & Sewer Authority (Grantee) a recipient of grant funds from the United States Environmental Protection Agency (EPA). Our review is undertaken pursuant to 40 Fed. Reg. 42406 (1975), where we stated that we would review complaints concerning contracts awarded under Federal grants. Howard questions the propriety of the Grantee's cancellation of the solicitation.

BACKGROUND

Pursuant to a grant from the EPA under title II of the Water Pollution Control Act (33 U.S.C. § 1281 et seq.), the Grantee solicited bids on three contracts in connection with the construction of a trunk sewer and pumping station for San Juan, Puerto Rico. The total estimated project cost was placed at \$7,044,344 of which 75 percent--or \$5,283,258--was to be funded by the EPA grant.

Although the Grantee's procurement activities involve a complex set of facts, the essence of the dispute in this case arises from the Grantee's decision to accept "Alternate II" from among four alternates in contract No. 2775. The four alternates, which called for use of different combinations of construction materials for the trunk sewer and force main, are listed below:

<u>I</u>	<u>II</u>	<u>I & III</u>	<u>II & IV</u>
Conc. Pipe & Structures without Coating	Conc. Pipe & Structures with Coating	Conc. Pipe & Structures + Ductile Iron Pipe for Force Main without Coating	Conc. Pipe & Structures + Ductile iron Pipe Force Main with Coating

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In its solicitation for bids on contract No. 2775 the Grantee included the following provision:

"AWARD OF CONTRACT. The Contract, if awarded, will be awarded to the lowest responsible bidder based upon a total computed price as specified hereinbefore under Canvas of Proposals, for the alternate bid items selected by the Owner [Grantee]"

Following submission of the bids, the Grantee decided against deployment of the alternates calling for ductile iron pipe and the uncoated concrete pipe. The iron pipe was rejected because the nitrous soil in the area where it was to be laid would cause the pipe to corrode. The uncoated concrete pipe was not chosen because it would be harmed by the reaction of the cement to the "aggressive chemicals in the sewerage system environment." Thus, the less durable alternates were rejected in favor of Alternate II (coated concrete pipe). The Grantee proposed award to Howard, the second lowest bidder on Alternate II, because the lowest bid, submitted by Blythe Industries, Inc. (Blythe), was found to be nonresponsive.*

The proposed award of contract No. 2775 to Howard was the subject of a protest by Blythe under EPA's procedures for considering bid protests. On March 31, 1977, the EPA Regional Administrator (for Region II) sustained the protest on the grounds that the specific criteria used by the Grantee in deciding against three of the four alternates was not mentioned in the specifications or otherwise made known to bidders as a factor in the award of the contract. The Regional Administrator concluded that the Grantee's method of procurement violated 40 C.F.R. § 35.938-4(c)(3), which requires "[a] clear explanation of the method of bidding and the method of evaluation of bid prices, and the basis and method for award of the contract."

In support of his conclusion the Regional Administrator quoted the following from our decision in 36 Comp. Gen. 380, 385 (1956):

"The purpose of statutes requiring the award of contracts to the lowest responsible bidder after advertising is to give all persons equal right to compete for Government contracts, to prevent unjust favoritism, collusion, or fraud in awarding Government contracts, and to secure for the Government the benefits which flow from free and unrestricted competition. See United States v. Brookridge Farm, 111 F. 2d 461. To permit bidders to compete on equal terms, the invitation must be sufficiently definite to permit the preparation and evaluation of bids on a common basis. Bidders cannot compete on an equal basis as required by law unless they know in advance the basis on which their bids will be evaluated.

* According to the analysis of the Regional Administrator, if the omissions which rendered Blythe's bid nonresponsive had been corrected, Howard's bid would be lower than Blythe's.

* * * * *

"The 'basis' of evaluation which must be made known in advance to the bidders should be as clear, precise and exact as possible. Ideally it should be capable of being stated as a mathematical equation. In many cases, however, that is not possible. At the minimum, the 'basis' must be stated with sufficient clarity and exactness to inform each bidder prior to bid opening, no matter how varied the acceptable responses, of objectively determinable factors from which the bidder may estimate within reasonable limits the effect of the application of such evaluation factor on his bid in relation to other possible bids. By the term 'objectively determinable factors' we mean factors which are made known to or which can be ascertained by the bidder at the time his bid is being prepared. Factors which are based entirely or largely on a subjective determination to be announced by representatives of the contracting agency at the time of or subsequent to the opening of bids violate the principle for the reason that they are not determinable by the bidder at the time his bid is being prepared."

Pursuant to the Regional Administrator's Determination of March 31, 1977, the Grantee cancelled the proposed award of contract No. 2775 and commenced the process of resolicitation. Bid opening for contract No. 2775 was rescheduled for approximately October 17, 1977.

DECISION

In his Determination of March 31, 1977, the Regional Administrator concluded that because three of the four alternates were eliminated in favor of Alternate II on the basis of their susceptibility to corrosion, the procurement of contract No. 2775 was "not conducive to a maximum free and open competition." * *

The solicitation for contract No. 2775 stated that award would be made to the lowest responsible bidder "for the alternate item selected by the

* * While EPA notes that no protest was filed concerning contract No. 2776 (phase II) and hence the facts of that procurement were not at issue in the protest of contract No. 2775 before the Regional Administrator, we think it significant that since the bidding documents and method of evaluation in contract No. 2776 (awarded to Blythe) were exactly the same as those present in contract No. 2775, no question was raised by the Regional Administrator concerning whether there was maximum free and open competition under contract No. 2776 which was opened on the same day and under which Alternate II was selected.

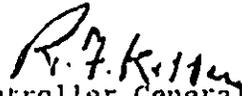
Owner [Grantee]." The obvious intent of this provision was to reserve in the Grantee the discretion to choose among the alternates without specifying the precise criteria to be employed. In other words, the choice of alternates would be the result of a "canvass of proposals" to determine the optimum combination of quality and price. This intention is indicated both by the language of the "Award of Contracts" provision and the fact that the alternates differed only as to the kind of material specified.

It would have been desirable to have the solicitation for contract No. 2775 rank each alternate according to the Grantee's order of preference. However, since, as already noted, Howard's was the low responsive bid on any one of the four alternates, the failure to do so does not constitute a cogent or compelling reason to order cancellation of the proposed contract. As was stated in Massman Construction Co. v. United States, 102 Ct. Cl. 699, 719 (1945): "To have a set of bids discarded after they are opened and each bidder has learned of his competitor's price is a serious matter, and should not be permitted except for cogent reasons." More recently, in 54 Comp. Gen. 145, 147, (1974) 74-2 CPD 121, our Office stated:

"The rejection of all bids after they have been opened tends to discourage competition because it results in making all bids public without award, which is contrary to the interests of the low bidder, and because rejection of all bids means that bidders have extended manpower and money in preparation of their bids without the possibility of acceptance. 52 Comp. Gen. 285 (1972). As a general proposition, it is our view that the cancellation after bids are opened is inappropriate when an otherwise proper award under a solicitation would serve the actual needs of the Government. 53 Comp. Gen. 586 (1974); 49 id. 211 (1969); 48 id. 731 (1969)."

In the present case, EPA's rationale for ordering cancellation does not constitute a cogent or compelling reason for its decision. Accordingly, we recommend that the resolicitation be cancelled and that award be made to Howard, the low responsive and responsible bidder under the original solicitation.

As this decision contains a recommendation for corrective action to be taken, it has been transmitted by letters of today to the congressional committees named in section 236 of the Legislative Reorganization Act of 1970, Public Law 91-510, 84 Stat. 1170, 31 U.S.C. § 1172 (1970).


Deputy Comptroller General
of the United States